COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Cambridge Electric Light Company and Commonwealth Electric Company for Approvals Relating to the Termination of Power Purchase Agreements with Pittsfield Generating Company, L.P.	)	D.T.E. 04-60

REPLY BRIEF OF PITTSFIELD GENERATING COMPANY

I. INTRODUCTION

On June 29, 2004, Cambridge Electric Light Company ("Cambridge") and Commonwealth Electric Company ("Commonwealth") (together, the "Companies") filed a petition with the Department of Telecommunications and Energy (the "Department" or "DTE"), pursuant to G.L. c. 164, §§ 1A, 1G, 76, 94, and 94A, for approval of: (a) the Termination Agreements between: (1) Cambridge and Pittsfield Generating Company, L.P. (formerly known as Altresco Pittsfield, L.P.) ("Pittsfield"); and (2) Commonwealth and Pittsfield (collectively, the "Termination Agreements"); and (b) the inclusion of certain Termination Agreement Payments and associated transaction costs in the variable component of Cambridge's and Commonwealth's respective transition charge (the "Petition").

On August 12, 2004, the Companies, the Office of the Attorney General ("Attorney General") and Pittsfield, intervenors in this case, filed initial briefs in the above-captioned proceeding. Consistent with the July 26, 2004 Procedural Schedule issued by the Hearing Officer, Pittsfield submits herewith its Reply Brief.

Pittsfield strongly urges the Department to reject the arguments and positions presented in the Attorney General's Initial Brief. In arguing that the Department should reject the Companies'

Petition, the Attorney General misreads, misinterprets and/or misunderstands the 1992 Power Sales Agreements between Cambridge and Pittsfield and between Commonwealth and Pittsfield, as amended on November 7, 1994 and November 21, 1996 ("1992 PSAs"), the rules and requirements of the regional power market, and Department precedent.

The Attorney General's interpretation of the 1992 PSAs is not persuasive. It is simply untrue that the 1992 PSAs do not allow ISO-NE to dispatch the plant. As addressed in detail in Pittsfield's Initial Brief, the 1992 PSAs were executed by the parties with a clear intent to ensure that changes in market rules, operations or procedures would be incorporated into the PSAs over time. *See* Pittsfield Initial Brief at 14-17. Moreover, the current NEPOOL rules specifically indicate that economic dispatch of the bulk power system is now the responsibility of ISO-NE. *Id.* at 17, *citing* NEPOOL Operating Procedure No. 1.[1]

Because the Attorney General misreads the 1992 PSAs, the Attorney General suggests that the Companies should have escalated their dispute or explored further the option of

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[1] In a variety of orders issued during the last several years, the Federal Energy Regulatory Commission ("FERC") has accepted jurisdiction over numerous changes (both proposed and completed) to New England's regional power dispatch methodologies. *See, e.g.,* Order Denying Rehearing, ISO New England, Inc. (ER04-121-001, Aug. 4, 2004); Order on Rehearing and Compliance Filing, New England Power Pool et al. (ER03-1318-002 et al., July 12, 2004); ISO New England, Inc. (Letter Order, ER03-854-002, July 9, 2004); Order on Compliance Filing and Establishing Hearing Procedures, Devon Power LLC et al. (ER03-563-030 et al.); Order Conditionally Accepting RMR Agreements, Consolidating Dockets, and Establishing Hearing and Settlement Judge Procedures, Devon Power LLC et al. (ER04-464-000 et al.)(noting at fn. 8 the Market Rule 1 scheduling and other procedures relating to the New England Market).

Under the Federal Power Act ("FPA"), FERC's jurisdiction over electric transmission in interstate commerce is pre-emptive in nature. See, New York v. FERC, 535 U.S. 1 (2002). State utility regulators, such as the Department, are required to give due deference to the pre-emptive effect of the FPA. See gen'lly, Nantahala P&L v. Thornburg, 476 U.S. 953 (1986). This Spring, the FERC issued a sweeping order confirming that effectively all aspects of transmission, and related wholesale power dispatch and market management and operation, are subject to FERC's jurisdiction. Order Granting RTO Status Subject to Fulfillment of Requirements and Establishing Hearing and Settlement Judge Procedures, ISO New England, Inc., et al. (RT04-2-000, et al., March 24, 2004). Consequently, the Attorney General's arguments concerning its own, singular interpretation of the 1992 PSAs at issue is without any effect - FERC, under the FPA, has set the rules for New England's transmission marketplace, including for the dispatch of power onto the grid, and a contrary private agreement could not - even if the Attorney General were correct, which he is not - defeat controlling Federal law.

terminating the 1992 PSAs. AG Brief at 5, 7-8. As addressed in detail in Pittsfield's Initial Brief, in suggesting these options, the Attorney General ignores the following: that the 1992 PSAs provide no grounds for early, unilateral termination; that early termination by the Companies would amount to a material breach of the 1992 PSAs; and that the Companies indeed considered the possibility of termination ("If we could have walked away, we would have."[2]) *See* Pittsfield Initial Brief at 22-23. Mostly, even if these so-called alternatives to the Termination Agreements were legally available to the Companies – which they decidedly were not – the Attorney General overlooks the significant costs and expenditure of time associated with pursuing these alternatives. *See* Pittsfield Initial Brief at 25-27. In disregarding the real world litigation and other costs associated with pursuing these options – not to mention the continuing payments required under the 1992 PSAs if the Companies were to pursue alternatives other than a material breach of the 1992 PSAs[3] – the Attorney General ultimately is asking the Companies and the Department to ignore their obligations under G.L. c. 164, § 1G(d)(1) to mitigate transition costs to the maximum extent possible. In the end, the transition costs paid by customers of the Companies cannot be mitigated to the maximum extent possible if the Companies are forced to pursue costly and unproductive strategies which fly in the face of the plain words of the 1992 PSAs and current market rules.

Many of the arguments in the Attorney General's Initial Brief are addressed comprehensively in Pittsfield's Initial Brief and will not be repeated here. There are, however, three arguments raised in the Attorney General's Initial Brief that warrant a reply. Each of these arguments is addressed below.

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[2] Tr. 179.

[3] *See* Pittsfield Initial Brief at 27 ("because the 1992 PSAs would continue to run through the course of arbitration, the Companies would continue to pay Pittsfield pursuant to the PSAs").

II. ARGUMENT

A. The Attorney General's Reliance on the *Tenaska Decision* is Misplaced

The Attorney General mistakenly suggests that the Companies were under some sort of obligation to inform the Department of the changes that occurred with respect to the 1992 PSAs after September 2003 or to "seek an Advisory Opinion from the Department regarding prudent actions the Company might take on behalf of its customers." AG Brief at 6. In support of this position, the Attorney General argues that the Department has jurisdiction over contract issues, pointing to the Department's decision in Tenaska Mass, Inc., D.P.U. 91-200 (1993) ("*Tenaska Decision*").

Nothing in the *Tenaska Decision* imposes any obligation on the part of the Companies to bring their dispute to the Department or on the Department to consider such a dispute. In fact, the *Tenaska Decision* involved a petition initially filed by a generator against an electric utility in which the generator argued that the utility had failed to submit a "restated" power sales agreement with the Department for approval. The dispute presented to the Department in the *Tenaska Decision* involved issues that had nothing to do with the interpretation of an existing power contract with respect to issues of operations and bidding. The major issue raised by the petition in the *Tenaska* case was whether the utility was required by the Department's then-current regulations to execute a "restated" PSA with a generator that had yet to construct its plant. Unlike the issue presented in *Tenaska*, the dispute between the Companies and Pittsfield is simply a matter of contract interpretation and not within the Department's jurisdiction.

Most importantly, it appears that the Attorney General has overlooked the main thrust of the *Tenaska Decision*. In that decision, the Department considered and approved a Settlement Agreement between Tenaska and Commonwealth Electric calling for a buyout of the existing

PSA between the parties. In approving the proposed settlement in *Tenaska*, the Department recognized that the dispute at issue was "complex" and that "[C]ontinued litigation of this dispute, whatever the outcome, could result in additional costs to ratepayers far in excess of the Settlement Agreement amount." *Tenaska Decision* at 8. The relevance of the *Tenaska Decision* is the Department's recognition of the advantages of a buyout over continued litigation costs and not the fact that the Superior Court ordered the Department to address a few discrete issues under the PSA in that case.

B. Use of a 90% Capacity Factor for Purposes of Calculating the Savings Associated with the Termination Agreements is Inappropriate

The record is replete with evidence demonstrating that use of a 37% capacity factor for purposes of calculating the savings associated with the Termination Agreements is conservative. *See* Pittsfield Initial Brief at 27, *citing* Tr. 55. In addition, the Companies demonstrated that even assuming historical capacity factors between 80 and 86 percent -- capacity factors the plant is highly unlikely to achieve again in light of the plant's current bidding practices, the plant's heat rate relative to newer gas-fired facilities with superior heat rates, and current fuel prices -- the Termination Agreements *still* yield savings to customers of between 3.62% and 4.68%. Exh. AG-2-3, Attachment AG-2-3(a) ERRATA, Attachment AG-2-3(b) ERRATA; Tr. 55.

In his brief, the Attorney General indicates that the plant's historical capacity factor is 90% (AG Brief at 5, n.3), but provides no record support for this statistic. In fact, the additional analyses run by the Companies for a capacity factor of 90% appear to have been conducted in response to an Attorney General information request, AG-3-5 ("Please recompute the NPV Savings assuming the Pittsfield plant produced electricity based on an average capacity factor of 90%"), and not because this number represented any historical average capacity factor. While it

is the case that the Termination Agreements indeed yield customer savings of 2.90 percent under the 90% capacity factor assumption (Exh. AG-3-5), the use of a 90% capacity factor should be dropped from the Department's analysis of savings associated with the Termination Agreements where the record demonstrates that (1) there is nothing in the record to support 90% as an accurate historical figure,[4] and (2) such a capacity factor could not be achieved under current conditions even if Pittsfield returned to previous bidding practices.

C. The Dispute Between the Companies and Pittsfield Did Not Did Affect the Value of the PSAs.

The Attorney General argues that "[T]he dispute could have affected the value of the PPAs for other bidders in the auction process because it presented a continuing uncertainty." The Attorney General further suggests that Pittsfield may have derived an advantage in the auction because of its knowledge of the dispute. AG Brief at 9-10.

This argument is simply not supported by what actually transpired. As the record in this proceeding demonstrates, the 2003 Auction conducted by the Companies was open, competitive and resulted in the Companies maximizing the mitigation of transition costs associated with the 1992 PSAs. *See* Companies Brief at 6. The record further demonstrates that Pittsfield prevailed in the 2003 Auction because its "bid was the most likely to create the greatest possible reduction in the above-market costs associated [with the 1992 PSAs], based on the price offered and the viability of the bid." *See* Companies Brief at 9, *citing* Exh. NSTAR-RBH at 19-20, 21-22. Most importantly, however, if other bidders were aware of the dispute, based on the Attorney General's logic, such knowledge would have resulted in a decrease in their bids. Accordingly, it

[4] Even NSTAR addresses this issue a bit too broadly when it states that "assuming capacity factors of above 80 percent (up to 90 percent).... the Pittsfield Termination Agreements would be no worse for customers than the Existing PPAs." Companies' Brief at 12-13. Certainly, where assuming capacity factors between 80% and 86%

is difficult to understand how this additional information would have resulted in a different outcome, or more significantly, an outcome that would have been more favorable to ratepayers.

III. CONCLUSION

The Attorney General has failed to provide the Department with any legitimate grounds to reject the Companies' Petition. In fact, as discussed in this Reply Brief, the Attorney General's arguments on brief appear to be based on a misunderstanding of the provisions of the 1992 PSAs, the workings of the regional power market, and the Department's case precedent.

Accordingly, based on the evidence presented during the proceedings and for the reasons set forth above and in Pittsfield's Initial Brief, Pittsfield respectfully requests that the Department grant the Petition of Cambridge and Commonwealth and approve the Termination Agreements.

Respectfully submitted,

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yield savings to customers of between 3.62% and 4.68%, it would be more accurate to conclude that customers achieve savings -- as opposed to merely "break even" -- at these levels.